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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1137

FOTOMAT CORPORATION,

Petitioner,

v.

PHOTOVEST CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Photovest Corporation respectfully requests that this Court deny the petition for writ of certiorari.

QUESTIONS PRESENTED

1. Was there error in the manner in which the district court handled a misunderstanding that surfaced on the

eve of trial regarding the timing of exchange of trial briefs?

2. Did petitioner (a) create the issue by its own misunderstanding or (b) waive the issue or (c) fail to make timely objection or (d) fail to show any prejudice from a nine-day delay in receipt of respondent's brief?

STATEMENT OF THE CASE

Introduction

In accordance with longstanding practice in the Southern District of Indiana, the pretrial order in this case, and the district court's local rules, respondent ("Photovest") submitted its trial brief to the district court but did not immediately serve a copy on petitioner ("Fotomat"). It did serve the brief on the tenth day of the thirty-one day bench trial, when it first became clear that Fotomat intended to make an issue of the point. The question is whether the few days' delay in service of Photovest's trial brief, under the unique circumstances in this case, constitutes error at all, and if so is it reversible error. The Court of Appeals, affirming the district court, held that it was neither.

The Holdings Below On The Merits

On the merits of Photovest's eight count complaint the district court held for Photovest on six counts, for Fotomat on one, and partly for each on one. App. 131a-143a. It ruled that Fotomat (a) violated the antitrust laws, and (b) was liable for contract breaches and fraud both warranting substantial punitive damages. No specific fact finding was challenged on appeal.[1] The Court of Appeals unanimously

[1] Fotomat did urge the Court of Appeals to "strictly scrutinize" *all* of the findings because they in part represented findings proposed by Photovest and allegedly were inconsistent in some respects, notably with regard to damages. Appellant's Opening Brief, pp. 22-31. In response the Court of Appeals "critically reviewed" the findings (App. 58a) and concluded, correctly, that there were no inconsistencies (*Id.*).

affirmed the bulk of the antitrust judgment after a detailed review of the record.[2] State law contract and fraud doctrines also support three-fourths of the judgment. As for Fotomat's claim that it had dealt fairly and in good faith with Photovest, the Court of Appeals tersely held: "We have reviewed the record in this regard and must flatly disagree." App. 53a.

The Procedural "Issue" Below

The abstract procedural issue Fotomat seeks to raise has no substance when the facts are examined. Rule 5(a) of the Federal Rules of Civil Procedure omits "briefs" from an extensive list of items required to be served. And, as the Court of Appeals observed, "the rule does not address the timing of the service." App. 7a. In both respects the rules for trial courts are different from those governing briefs in the courts of appeals and in this Court. Those require immediate service of "all papers" and "briefs," respectively. Fed.R.App.P. 25(b); Sup. Ct. Rule 41(7). A "trial brief" is typically filed with the court shortly before trial to alert the court to parties' contentions and the expected evidence. Where pretrial service is not required, the trial brief may also candidly seek to alert the court to how a party proposes to try the case, including

[2] Fotomat suggests that the antitrust law aspects of the decision are questionable (Pet., p. 13, n. 13). But the current service to one leading treatise summarized the antitrust holdings of the Court of Appeals as follows:

> "The case is almost a textbook review of the criteria for establishing a relevant market, attempted monopolization in violation of Sherman Act Section 2 and illegal tying in violation of Sherman Act Section 1, as well as an exposition of the clearly predatory use of economic power."

Von Kalinowski, *Antitrust Report* 9 (Nov. 1979).

inconsistencies that it hopes to develop in the testimony of adverse witnesses. Photovest's trial brief was of this type.

It is well settled that the practice of exchanging or not exchanging trial briefs prior to trial varies from court to court and that local rules must be consulted:

> "Some trial courts have rules requiring the service of a copy of the trial brief upon counsel for the other side. Local rules and statutes must be consulted in this regard. If there is no court rule covering the subject, it may be discretionary with the presiding judge to decide whether or not to direct that a copy be served on opposing counsel."

The Trial Brief, 5 Am. Jur. Trials 89, 92 (1966).[3] In the Southern District of Indiana the published local rule[4] and longstanding practice[5] have been *not* to exchange until the conclusion of trial. In bench trials, the exchange occurs before post-trial briefing and decision. Fotomat, whose local counsel were familiar with the rule (X Tr. 1697) but whose chief trial counsel were not (*see* note 6, *infra*), for the first time questioned delayed service on the afternoon

[3] *See also,* Zammit, *The Trial Brief And The Trial Memorandum,* 24 Prac. Law. 73, 80 (1978), for the proposition that service of trial briefs is a matter for local rule or practice. The local district rules listed in footnote 4 to the Court of Appeals opinion (App. 7a) appear to permit delayed exchange. Many others expressly require "service" (*see, e.g.,* S.D. Cal. Rule 12) and many are silent on this point. State rules also vary. *Compare* Indiana Trial Rule 5 *with* Massachusetts Rule 5, both of which are patterned after the Federal Rules of Civil Procedure. Indiana expressly provides "except trial briefs" and Massachusetts expressly adds "briefs" to the list of items to be served under Rule 5.

[4] Local Rule 19(k) provides for *submission* of trial briefs, jury instructions and proposed findings, but requires *service* only of jury instructions. Rule 19(k), S.D. Ind. The full text of the rule is set forth in footnote 2 of the Court of Appeals opinion, App. 5a.

[5] Ind. State Bar Ass'n, *Federal Court Pleading & Practice* 266 (1960); XI Tr. 1719, 1722.

of the last business day before trial (Tr. 209), the date the pretrial order called for briefs of both sides to be due. That was after Photovest's brief had been prepared and submitted earlier that day on the assumption the pretrial order and the rule and practice in the district would be followed. R. 2288-96. The misunderstanding by Fotomat as to the ground rules in the district was attributable to—if not caused by—Fotomat.[6] The brief contained no legal theory that was not developed in the pleadings and massive discovery. Nor were there factual surprises.[7]

[6] Fotomat was represented by two firms, one which did—and one which did not—regularly practice in the Southern District of Indiana. The first was—and the second was not—familiar with the local rule and practice (until changed by the Court of Appeals in this case) not to exchange trial briefs until the end of trial. Fotomat elected to use the second firm as its chief trial counsel. In the hearing on this matter conducted on trial day ten, Fotomat's counsel reported a failure of communication among Fotomat's own counsel on this point. Acknowledging that Fotomat's local counsel had informed its chief trial counsel of the nonexchange rule as early as March, 1975 (almost two years before trial), Fotomat's attorney stated:

> "I think that is probably the root of the misunderstanding, because when he told me that—when our local counsel told me that and when I discussed that, I think with [Photovest's attorney], it was my understanding that when you say 'trial briefs aren't exchanged' that there simply weren't trial briefs: didn't bring them in, exchange them, and didn't give them to the Judge either." XI Tr. 1706.

Fotomat of course has the right to utilize counsel of its choice. But that election does not give it any more or fewer rights that it would otherwise have.

[7] Photovest's basic charges and detailed lists of evidence supporting them were set forth in voluminous answers to interrogatories, many of which asked Photovest to "State each fact upon which you base" the separate allegations of the 23-page complaint. The "personal attacks" to which Fotomat refers are apparently the contention that Fotomat in essence misled its own attorneys as well as Photovest. This identical contention was in pretrial summary judgment briefing (R. 1401, pp. 8-9, 26-27) as well as the opening statement (Tr. 229-230). For example, the position that was described as "indefensible" at page 98 of the trial brief (Pet., p. 12, n.11) was described as "baseless" in Photovest's interrogatory

When denied immediate access to Photovest's complete brief, Fotomat then promptly submitted *but did not serve* a second brief of its own attacking the credibility of Photovest's principal witness who had not yet begun his testimony. Tr. 215; R. 1794, 1973. Photovest agreed to serve an edited version of its brief (Tr. 213-4) and assumed that was the end of the matter when that was done on day nine (R. 2297-98, 2300). No further objection was voiced until near the end of a two-month recess that occurred between day nine and day ten. Then, before the tenth day (but after it had conducted five days of cross-examination of Photovest's principal witness with its own unserved brief before the court), Fotomat finally served its second brief and filed a motion for a mistrial. R. 2300, 1967. Fotomat also served a 290-page brief that was, in effect, an answer to Photovest's initial brief. R. 2008. At that point, none of Fotomat's witnesses had yet testified.

At the hearing held on the tenth trial day, Fotomat was unable to identify any prejudice to that point (XI Tr. 1686, 1704) but was concerned about the effect of the unseen portion of the brief on its defense which had not yet begun (XI Tr. 1687, 1705). On that day, before *any* of Fotomat's witnesses testified[8] and almost two weeks before it began

answers filed eleven months before trial. R. 559, p. 126. Any brief is argumentative and presents the view of its authors. The brief in this case is a matter of record. R. 1552-1779. It deals with the issues in this case and involves vitriol or personal attacks only in the sense that it contends —and four judges have agreed—that Fotomat's conduct was oppressive, not in good faith and in some instances fraudulent. It is no different from any other brief as a review would readily reveal.

[8] The Court of Appeals (in footnote 6 to the opinion) did not pass on Fotomat's suggestion at oral argument (by counsel who did not participate in the trial) that perhaps some of the witnesses who plaintiff Photovest called to testify in the first nine days were actually defense witnesses called as hostile witnesses. The fact is that prior to day ten the only

its defense, Fotomat received the entire brief whose delayed service is the basis of the alleged "important question" in this Court. XI Tr. 1726. Fotomat also was given the right to recall Photovest's witnesses who had testified before service. XI Tr. 1716. During the ensuing 21 days of trial, Fotomat raised no further objection or claim of prejudice. Fotomat admitted during oral argument in the Court of Appeals, after almost two years of scouring the record for error, that it knew of nothing in the brief that was not admitted into evidence at the trial and still could identify no prejudice. No evidentiary ruling was challenged on appeal. Photovest disagrees with many other of the statements and characterizations of the events in the district court contained in the petition but submits that none rises to the dignity of an issue for this Court.[9]

The Court of Appeals concluded that the abstract procedure of exchange after trial is consistent with Rule 5 and the Constitution. However, this case does not present that abstract issue for several reasons. These include the fact that, as the Court of Appeals observed, "the delayed exchange procedure was abandoned early in the trial" (App. 11a), as well as the court's finding that there was

witnesses were officers or employees of Photovest (Whitney, Roberts and Thomas) or persons affiliated with independent processors clearly favorable to Photovest (Brodnik and Hawes). Tr. 335, 447, 518, 580, 970.

[9] For example, on day one the edited brief was not "ordered" to be served in three days as claimed by Fotomat (Pet., p. 5). Three days was a "best guess" as to the time revising would require, given that both attorneys familiar with the case were tied up in trial. Tr. 213-4; R. 2297-8. Fotomat obviously knew it did not have the brief until day nine and made no objection. R. 2298. Although Fotomat describes the delay as two months, a recess of eight weeks occurred between day nine and day ten while the court was occupied with other cases at another division. In that district judges still "ride circuit." Moreover, most of the brief was served on day nine before the recess, as the edited version reveals. R. 1801.

no prejudice to Fotomat in any event (*Id.*). The court nevertheless exercised its supervisory powers prospectively to require service of trial briefs in the Seventh Circuit at the same time they are submitted to the court. It did not elect to deal with the other flaws in Fotomat's position, each of which is an independent ground for affirming the district court.

REASONS FOR DENYING THE WRIT

1. The Facts Do Not Present The Issue Fotomat Seeks To Raise

The Seventh Circuit's conclusion that the rules permit exchange at the conclusion of trial, though correct, was dicta. What the court *held* was (a) the nine-day delay on the unusual facts of this case was not error, and (b) Fotomat in any event had neither claimed nor shown any prejudice from the procedure. When the facts are understood, it becomes clear there was no error at all in the manner in which the district court handled a misunderstanding that produced a belatedly raised challenge to local practice. In any event, this presents no significant question because it turns on the odd facts of this case. Similarly, even if there were some abstract error, it was Fotomat's burden to show prejudice. *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943). Under both Rule 61 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2111, claimed errors "which do not affect the substantial rights of the parties" are not a basis for appeal.[10] This too is a factual determination involving an

[10] The full text of 28 U.S.C. § 2111 is:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Rule 61 is identical for these purposes.

analysis of the highly unusual and apparently unique facts of this case. As such, it presents no issue worthy of this Court's attention,[11] precisely because precedent is of little value in evaluating a claim of prejudice:

> "* * * It needs to be emphasized again that whether a particular error is harmless or prejudicial depends very much upon the circumstances of the particular case."

11 Wright & Miller, *Federal Practice & Procedure* § 2888, p. 300 (1973).

Moreover, there plainly is no prejudice. Rather, the delayed exchange had no effect whatever on anything that took place in the trial. Fotomat has never claimed the brief was in any respect false or predicted evidence that did not materialize.[12] Nor has it pointed to any ruling of any kind during the first nine days that was allegedly improperly influenced. To avoid this fatal problem, Fotomat claims that it inherently cannot know how it was prejudiced without "psychoanalyzing" the district court. Petition, p. 10. Yet the doctrine of "presumed prejudice" that Fotomat seeks to invoke has been abolished in the federal courts since the enactment in 1919 of the predecessor to 28 U.S.C. § 2111. 7 *Moore's Federal Practice* ¶ 61.02 (1979). Indeed, even where documents (*e.g.*, "motions") expressly required to be served under Rule 5(a) are not contemporaneously served, it is well settled that there is no reversible error

[11] *See, e.g., Goins v. United States*, 306 U.S. 622 (1939).

[12] *Cf. Benna v. Reeder Flying Service, Inc.*, 578 F.2d 269, 272 (9th Cir. 1978) (harmless error for jury to view inadmissible evidence where its substance is contained in other admissible evidence); *Oates v. S. J. Groves & Sons Co.*, 248 F.2d 388, 389 (6th Cir. 1957) (harmless error for judge in nonjury case to read unadmitted deposition containing matters otherwise in evidence).

unless some prejudice is shown from the delay.[13] This, of course, reflects fundamental policy to eliminate expensive and docket clogging retrials where substantial justice has been done—as it was here.

Fotomat's claim also fails as a matter of simple logic. If Rule 5(a) of the Federal Rules of Civil Procedure required immediate service of trial briefs, the error would *not* be giving the brief to the court. The alleged error is deferring service on the other side. Otherwise stated, if this case involved any "substantial right" of Fotomat within the meaning of Rule 61 or 28 U.S.C. § 2111, that "right" would be to receive a copy of the brief at the same time it is submitted. Fotomat has no right—substantial or insubstantial—to stop Photovest from saying what it wishes in its brief. Both sides submitted initial trial briefs at the start of trial. Fotomat then submitted two more briefs during trial—an unserved brief on day three and a 290-page brief on day ten. Both sides submitted extensive post-trial briefs. Whatever impact the briefs had *on the court* existed regardless of time of service on the opponent. Fotomat needed—but failed—to show how *it* would have acted differently if it had obtained Photovest's first brief without a nine-day delay. If there were any prejudice, it would necessarily be in the nature of some act or omission by Fotomat during the first nine days of Photovest's case based on lack of knowledge of the brief's contents. In the

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[13] *See, e.g., U.S. Industries, Inc. v. Semco Manufacturing, Inc.,* 562 F.2d 1061, 1066 (8th Cir.), *cert. denied,* 434 U.S. 986 (1977), which rejected an appeal based upon an unserved motion for a directed verdict:

> " • • • Beyond its allegation that an error occurred, Semco makes no allegation that it was prejudiced in any way, or that it would have proceeded differently with its presentation of evidence at trial."

See also, Hahn v. Becker, 551 F.2d 741, 745 (7th Cir. 1977); *Chief Freight Lines Co. v. Local Union No. 886,* 514 F.2d 572, 577 (10th Cir. 1975).

trial court, in the Court of Appeals, and in the three years since this incident first came to the parties' attention, Fotomat has pointed to no such act or omission.

In short, the nine-day delay made absolutely no difference in the conduct or result of the trial. For that reason alone the decision of the Court of Appeals is clearly correct, and involves no issue of general interest. It is no more noteworthy than if the service copy of a brief were lost in the mail for nine days or if the district court had announced on day ten that it had completed reading plaintiff's brief and would turn promptly to defendant's.

Finally, Fotomat suggests that delayed brief exchange presents parallels to *ex parte* communication with the court. That is incorrect. First, the question is only *when*, not *whether* the opposing side receives the brief. Under the delayed exchange procedure the brief of each side in its entirety is served at the conclusion of trial. Either side can then respond as it wishes to anything with which it disagrees. The risk of overblown claims or predictions that are not fulfilled is obvious, and judges are alert to compare the claims of the parties to the evidence. Second, the procedure in the abstract is neutral—both sides avail themselves of it. No one has a right to unilateral *ex parte* meetings with the court. But both sides have a right to file briefs and neither has a right to stop the other. Third, under delayed exchange procedure there is no doubt about what the trial brief said and, therefore, no doubt about the ability to rebut or to show prejudice if there is any. The procedure is thus wholly different from unknown *ex parte* communications that taint the appearance of impartiality even if no improper influence is in fact exercised. Indeed, because the brief is served before decision with an opportunity to reply, it is not *ex parte* at all. Fourth, the

brief does not "kerwhoppy" anyone; and contrary to Fotomat's claim (Petition, p. 4), the district court did not imply or state that that is its purpose. What the district court said, and what is true, is that a brief that is not to be exchanged until after trial often predicts the *evidence* that will "kerwhoppy" witnesses who are expected to testify inaccurately. Tr. 214. Of course, this is done in open court. As it turned out in this case, the brief was served before Fotomat's witnesses testified but the telegraphed punches landed anyway. In short, the procedure is sensible and is permitted by the Federal Rules as they are presently written. It certainly affects no fundamental or substantial right of any party.

2. The Issue Was Waived Because Not Timely Raised.

Among other reasons for rejecting Fotomat's contention not reached by the Court of Appeals, the district court held:

> " * * * The parties were fully informed of the rule long before the commencement of the trial and no reasonable effort was made to timely seek an advance of trial ruling upon the rule and policy of this Court concerning exchange of trial briefs."

R. 2336. Until the eve of trial Fotomat made no objection to the local rule or to the pretrial order entered months before the trial began. Unlike previous versions proposed incident to earlier postponed trial settings, that order did not require exchange of briefs. R. 2289-96. Under long-standing practice, that order, authored by Fotomat and approved by Photovest, normally provides whether briefs are to be exchanged before or after trial. XI Tr. 1724; R. 2295. Only on the last day before trial did Fotomat voice any disagreement with the delayed exchange procedure. That was after Photovest—in reliance on the local

rules, local practice and the pretrial order—had submitted its brief which had been prepared on the assumption it would not be available to Fotomat's witnesses until after they had testified. As the district court held, that was too late to object. After reviewing the extensive exchange of correspondence and finding no order or agreement requiring pretrial service, the district court correctly determined to "leave counsel where they find themselves." XI Tr. 1718.

Fotomat knew of the local practice and rule from the outset of the case. Indeed, at the first pretrial conference, through its local counsel, Fotomat took the position that it preferred *not* to serve trial briefs at the time they were submitted. R. 2291.[14] Its effort to raise an issue on the eve of trial through its internal confusion presents no basis for appellate review.

3. Fotomat Waived The Issue By Submitting Its Own Unserved Brief.

When its chief trial counsel learned that trial briefs could be submitted but served only after trial, Fotomat promptly submitted its own brief dealing specifically with the credibility of Photovest's principal officer. Tr. 215; R. 1794. That witness was cross-examined by Fotomat for five days while Fotomat's brief was submitted but not served. Only after the completion of the testimony discussed in its unserved brief did Fotomat decide that it should serve the brief and claim irregularity because it had not received Photovest's. At that point, Photovest also voluntarily

[14] In this respect the Seventh Circuit's observation that "Fotomat was apparently unaware of the procedure until the first day of trial" (App. 4a) is incorrect. Fotomat's chief trial counsel were unaware of the rule (*see* n. 6, *supra*), but Fotomat's local counsel (and, hence, the party Fotomat) clearly was familiar with the procedure from the outset. X Tr. 1697; XI Tr. 1722.

served its brief. In short, Fotomat availed itself of the practice it now urges as a basis for reversal. These facts constitute a waiver of procedural irregularity. *United States v. Patrick,* 542 F.2d 381, 392 (7th Cir. 1976), *cert. denied,* 430 U.S. 931 (1977). But that issue is of absolutely no general importance or interest to this Court.

4. There Is No Conflict Among The Circuits, And No Significant Issue.

This issue has never arisen before in any federal case[15] and is unlikely to arise again. There is no conflict among the circuits as to any issue. Obviously the exercise of circuit supervisory powers involves no conflict—there simply may be a different practice in different circuits. Variances in local district rules are equally unimportant. Moreover, there is no case or controversy as to the exercise of supervisory powers because neither side has any interest in the rule established for future trials.

There is also no significant issue for the same reason the issue has never been raised before: in the few federal districts permitting delayed exchange of trial briefs, both parties normally agree whether service will be before or

[15] One state case also rejected a similar claim. *Scott County School District 1 v. Asher,* 160 Ind. App. 299, 312 N.E.2d 131, 136 (1974), *aff'd,* 263 Ind. 47, 324 N.E.2d 496 (1975). Independent research by Fotomat, Photovest and the Court of Appeals (App. 6a) has failed to turn up any other federal case. Photovest's efforts in this regard include, on February 1, 1980, running the following Lexis search through the "cases" file of the "general federal" Lexis library: TRIAL BRIEF or TRIAL MEMO! w/25 RULE 5! The search turned up 78 cases, only one of which (the Court of Appeals decision in this case) dealt with an issue of delayed service of a trial brief. Most of the 78 cases dealt with Rule 52 (findings and conclusions) or Rule 56 (summary judgment) which are included by Lexis in a request for "RULE 5!" Lexis' "cases" file presently includes district court opinions (many otherwise unreported) since 1960, court of appeals opinions since 1945, and Supreme Court opinions since 1938.

after trial. The simple fact is that the issue was generated in this case by peculiar facts, notably a misunderstanding which Photovest submits was attributable to Fotomat. The issue cannot recur in the Seventh Circuit by virtue of the rule announced in this case. There is no reason to believe the issue is likely to come up anywhere else just as it never arose before in the Southern District of Indiana, because the pretrial order normally resolves the matter to the satisfaction of both sides before either prepares its brief.

5. If A Change In Rule 5(a) Is Appropriate, Rulemaking Powers Of This Court—Not A Replay Of A Lengthy Trial Involving No Prejudice—Is The Appropriate Procedure.

In 1970, Rule 5(a) was amended to require that all discovery papers are to be served on all parties, adding a requirement that did not previously exist. 48 F.R.D. 491-2. If the federal rule should be changed nationwide to require contemporaneous service of trial briefs, amendment of the rule is also the procedure for that. There is no reason to review this case. Indeed, if the issue may be raised on the eve of or during trial as Fotomat seeks to do, an unknown number of pending trials would be disrupted by such a review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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